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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. THOMAS CHRISTOPHER MCDONALD, Defendant - Appellant.	No. 05-30253 D.C. No. CR-04-00010-SEH MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted April 5, 2006
Seattle, Washington

Before: CANBY, GOULD, and BEA, Circuit Judges.

Thomas McDonald appeals the district court's denial, in part, of his pretrial motion to suppress his September 20, 2002 statements "and all alleged evidence derived or otherwise obtained as a result of these statements" from his trial for conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846. After a

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

hearing, the district court granted McDonald's motion as to McDonald's statements because they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), but denied the motion as to "evidence obtained through independent sources," including the testimony of the government's five key witnesses.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

This court reviews for clear error the district court's application of the inevitable discovery and independent source doctrines because, although mixed questions of law and fact, they are essentially factual inquiries. *See United States*

[1] Because the parties are familiar with the factual and procedural history we do not include them here except as necessary to explain our disposition.

v. Reilly, 224 F.3d 986, 994 (9th Cir. 2000); *United States v. Montoya*, 45 F.3d 1286, 1295 (9th Cir. 1995).[2]

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[2] Because neither party has claimed otherwise, for purposes of this appeal we assume, without deciding, the fruit of the poisonous tree doctrine, *see Wong Sun v. United States*, 371 U.S. 471, 488 (1963), applies to evidence derived from McDonald's September 20, 2002, statement.

While Judge Gould may be correct that the fruit of the poisonous tree doctrine does not apply to *Miranda* violations, neither the Supreme Court nor the Ninth Circuit has precisely so held. In *Michigan v. Tucker*, 417 U.S. 433 (1974), the Supreme Court held the introduction of the testimony of a witness discovered because of an unMirandized statement by the defendant did not violate the Fifth Amendment when the failure to administer *Miranda* warnings took place *before Miranda* was decided. *Id*. at 447 ("We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda. Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground."). In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court held where an initial confession was made voluntarily but without *Miranda* warnings, and a second confession was made after the defendant received and waived his *Miranda* rights, the second confession was admissible notwithstanding the officers' failure to advise the defendant that the first confession could not be used against him. In *United States v. Patane*, 542 U.S. 630 (2004), the Court held that the failure to give the suspect *Miranda* warnings did not require suppression of the physical fruits of the unwarned statement. There was no majority opinion in *Patane*, however, and the concurrence that was essential to the result relied in part on "the important probative value of reliable physical evidence" and the doubt that its exclusion could "be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation." *Patane*, 542 U.S. at 645 (concurring opinion). We cannot be certain whether the concurring Justices would strike a different balance when the fruits of the unwarned statement were testimony of witnesses rather than physical evidence. Because the Supreme Court has yet to decide whether *Wong Sun* applies to the introduction of

(continued...)

Assuming a link between McDonald's unMirandized statements and the testimony of each witness, the government interviewed each witness for reasons unrelated to, and had motivation to ask each witness about McDonald (including the showing of McDonald's picture) independent of, McDonald's unMirandized statements. Therefore, the district court did not clearly err in determining McDonald's unMirandized statements did not "tend significantly to direct the investigation toward the specific evidence sought to be suppressed." *United States v. Taheri*, 648 F.2d 598, 600 (9th Cir. 1982) (quoting *United States v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974)).

AFFIRMED.

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[2](...continued)
third party testimonial evidence discovered as a result of an unMirandized statement made after the *Miranda* decision, and because neither party has raised the issue, we, like the Supreme Court in *Michigan v. Tucker*, decline to so decide today. In addition, we note the record before this court is insufficient to determine whether McDonald's unMirandized statements were made voluntarily, as required by *Elstad* and *Patane*.